Supreme Court, U.S.
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No. 94-724

(3)

In The Supreme Court of the United States

October Term, 1994

UNITED STEELWORKERS OF AMERICA,

Petitioner,

v.

LESLIE RAY COX, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENT USX CORPORATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit erred in holding that the RICO "pattern of racketeering" requirement may be satisfied through the allegation that a single bribe transaction with a single objective encompassed a series of separate criminal events—the solicitation of the bribe, the agreement to the bribe, and the payment of the bribe in monthly installments (pension payments) rather than in a lump sum—a holding contrary to the rule in five other circuits that a single transaction with a single objective cannot be made into a "pattern" by dissecting the transaction into a series of discrete criminal acts.

2. Whether the Eleventh Circuit erred in holding, contrary to the rule in the eleven other circuits, that a RICO action under 18 U.S.C. § 1962(c)—which makes it unlawful for "any person" who is "employed by or associated with any enterprise . . . to conduct . . . such enterprise's affairs through a pattern of racketeering activity"—may be brought against the "enterprise" itself.

DISCLOSURE STATEMENT PURSUANT TO RULE 29.1

Respondent USX Corporation is a publicly owned corporation with three classes of common stock, USX-Marathon Group, USX-U.S. Steel Group, and USX-Delhi Group.

Non-wholly owned subsidiaries of Respondent USX Corporation include CLAM Petroleum Company, Double Eagle Steel Coating Company, Laredo-Nueces Pipeline Company, National-Oilwell, PRO-TEC Coating Company, USS/Kobe Steel Company, USS-POSCO Industries, Worthington Specialty Processing, Transtar, Inc., LOCAP INC., LOOP INC., Kenai LNG Corporation, Ozark Gas Transmission System, and RMI Titanium Company.

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BRIEF OF RESPONDENT USX CORPORATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondent USX Corporation ("USX") respectfully submits that a Writ of Certiorari should be granted in connection with both questions presented in the petition of the United Steelworkers of America ("Union").

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's Decision That Allegations Of A Single Bribe Can Satisfy RICO's "Pattern" Requirement Conflicts With Decisions Of The First, Second, Third, Sixth And Seventh Circuits.

USX supports the Union's petition on the RICO pattern issue. The decision below graphically illustrates the need for further Supreme Court guidance with respect to the "pattern" required for liability under the Racketeer Influenced and Corrupt Organizations Act of 1970 ("RICO"), 18 U.S.C. §§1961 *et seq.* In a singularly overbroad interpretation, the Eleventh Circuit held that the requisite pattern element under RICO can be satisfied by allegations of a single bribe which is offered, accepted, and paid out in monthly installments. This holding squarely conflicts with the settled law in five other circuits.

The RICO provision at issue here, § 1962(c), creates liability for participation in a "pattern of racketeering activity." 18 U.S.C. § 1962(c). Under the statutory definition, a "pattern" requires at least two acts of racketeering activity. 18 U.S.C. § 1961(5). Beyond this "minimum necessary condition," "continuity plus relationship" also are required. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 237-39 (1989). More specifically, racketeering predicates must be related, and they must amount to or pose a threat of long term or continued criminal activity. *Id.* at 239.

Plaintiffs below alleged a single bribe or act of extortion. They claimed that in the course of negotiating a labor agreement to reopen the idled Fairfield Works, USX agreed to grant leave of absence credits to certain Union officials who formerly worked for USX in exchange for contract concessions. Thereafter, USX allegedly paid out the bribe in the form of monthly pension benefits. To transform this plain and simple alleged bribe into a pattern of racketeering activity, the Eleventh Circuit split the transaction into its necessary component parts. The court found that the pattern requirement was satisfied by the mere alleged facts that (1) a bribe was solicited, (2) the bribe was agreed to, and (3) the bribe was paid in the form of pension benefits, in monthly installments, over a three and one half year period. Union App. at 13a-14a.

The Eleventh Circuit held that acts which are part of the same scheme or transaction can qualify as distinct predicate acts "so long as 'each act constitutes a separate violation of the state or federal statute governing the act in question.' " Union App. 13a (citing *United States v. Watchmaker*, 761 F.2d 1459, 1475 (11th Cir. 1985)). Because each separate pension payment was alleged to be a violation of 29 U.S.C. § 186, the Eleventh Circuit reasoned, each payment qualified as a distinct predicate act. The Eleventh Circuit dispensed with the "continuity" requirement mandated by the teachings of this Court with a summary conclusion that the alleged bribe could be viewed "as a scheme consisting of multiple violations, sufficiently interrelated and continuous to constitute a pattern of racketeering activity." Union App. 13a.

The Eleventh Circuit's interpretation of "pattern of racketeering" directly conflicts with the weight of authority in the other circuits. The courts of appeals for the First, Second, Third,

Sixth and Seventh Circuits all have held that the pattern requirement cannot be satisfied by dissecting a single transaction with a single objective into a series of component parts:

First Circuit:	*Roeder v. Alpha Indus.*, 814 F.2d 22, 30-31 (1st Cir. 1987).
Second Circuit:	*Clapp v. Greene*, 743 F. Supp. 273, 277-78 (S.D.N.Y. 1990), *aff'd*, 930 F.2d 912 (2d Cir.), *cert. denied*, 112 S.Ct. 197 (1991).
Third Circuit:	*Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1417-19 (3d Cir.), *cert. denied*, 501 U.S. 1222 (1991).
Sixth Circuit:	*Vemco, Inc. v. Camardella*, 23 F.3d 129, 134-35 (6th Cir. 1994).
Seventh Circuit:	*420 East Ohio Ltd. Partnership v. Cocose*, 980 F.2d 1122, 1124-25 (7th Cir. 1992); *United States Textiles, Inc. v. Anheuser-Busch Cos.*, 911 F.2d 1261, 1267-69 (7th Cir. 1990).

In *Apparel Art Int'l, Inc. v. Jacobson*, 967 F.2d 720, 723 (1st Cir. 1992), Justice Breyer, in an opinion he authored as Chief Judge of the First Circuit, summarized the prevailing view as follows:

> [H]owever courts express the point, they have consistently held that a single episode does not constitute a "pattern,"

> even if that single episode involves behavior that amounts to several crimes (for example, several unlawful mailings).

To hold otherwise, Justice Breyer explained, "would mean that many individual bank robberies, frauds, drug sales, embezzlements, and other crimes as well would automatically fall within the scope of the RICO statute, a result contrary to RICO's basic purpose." *Id.* at 722, *citing H.J. Inc.*, 492 U.S. at 239.

The anomalous result of the court of appeals below is contrary to RICO's basic purpose and creates confusion which only this Court can allay. This Court should further illuminate the contours of the pattern requirement, and free litigants in the Eleventh Circuit from the uniquely expansive interpretation adopted below.

II. The Eleventh Circuit's Rule That A Corporate Entity May Simultaneously Be Both An "Enterprise" And A "Person Employed By Or Associated With" That Enterprise Under 18 U.S.C. § 1962(c) Is In Conflict With The Law In Every Other Circuit.

The Eleventh Circuit stands alone in holding that a § 1962(c) RICO action may be brought against an "enterprise." The eleven other circuits have all concluded that § 1962(c) means what it says—that it is unlawful for "any person employed by or associated with any enterprise" to conduct the affairs of that enterprise through a pattern of racketeering activity.

The plain language of § 1962(c) clearly contemplates that a "person" is distinct from the "enterprise" itself:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such

> enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). The "person" targeted by the prohibitions in § 1962(c) is an entity separate from the "enterprise." It is the conduct of the "person" that is rendered unlawful under the Act, not the conduct of the enterprise.

The Eleventh Circuit has rejected this literal construction of § 1962(c), holding that a corporate entity may *simultaneously* be both a § 1962(c) "person" and a § 1962(c) "enterprise." This view not only flies in the face of the clear language of the statute; it also is directly at odds with the law in every other circuit. All other courts of appeals have held that § 1962(c) applies *only* to persons employed by or associated with an enterprise, and not to the enterprise itself:

D.C. Circuit:	*Yellow Bus Lines, Inc. v. Drivers Local 639*, 883 F.2d 132, 139-41 (D.C. Cir. 1989), *aff'd in pertinent part*, 913 F.2d 948, 950-51 (D.C. Cir. 1990) (en banc), *cert. denied*, 501 U.S. 1222 (1991).
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Third Circuit:	*Lorenz v. CSX Corp.*, 1 F.3d 1406, 1411-13 (3d Cir. 1993).
Fourth Circuit:	*Busby v. Crown Supply, Inc.*, 896 F.2d 833, 840-41 (4th Cir. 1990) (en banc), *aff'd*, 948 F.2d 1280 (4th Cir. 1991).

Fifth Circuit:	*Elliott v. Foufas*, 867 F.2d 877, 881 (5th Cir. 1989).
Sixth Circuit:	*Puckett v. Tennessee Eastman Co.*, 889 F.2d 1481, 1488-89 (6th Cir. 1989).
Seventh Circuit:	*D & S Auto Parts, Inc. v. Schwartz*, 838 F.2d 964, 966-68 (7th Cir.), *cert. denied*, 486 U.S. 1061 (1988).
Eighth Circuit:	*Bennett v. Berg*, 685 F.2d 1053, 1061-62 (8th Cir. 1982), *aff'd in pertinent part*, 710 F.2d 1361, 1364 (8th Cir.) (en banc), *cert. denied*, 464 U.S. 1008 (1983).
Ninth Circuit:	*Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1533-34 (9th Cir. 1992).
Tenth Circuit:	*Board of County Comm'rs* of *San Juan County v. Liberty Group*, 965 F.2d 879, 885 & n.4 (10th Cir.), *cert. denied*, 113 S.Ct. 329 (1992).

The decision of the court of appeals below rests on an interpretation of § 1962(c) that is squarely the opposite of the law in all these circuits. Absent action by this Court, litigants in the Eleventh Circuit will continue to face civil and criminal liability which Congress simply did not create. This Court should bring the law of the Eleventh Circuit into conformity with the law of the other circuits and, more basically, with the law enacted by Congress.

CONCLUSION

The Union's petition presents two fundamental questions of RICO interpretation. On the pattern issue, the Eleventh Circuit's decision is directly contrary to clearly-settled law in the First, Second, Third, Sixth and Seventh Circuits. With respect to the enterprise issue, the Eleventh Circuit's decision is premised upon a square conflict with the law in all eleven other circuits. USX respectfully submits that these conflicts raise important issues with respect to the interpretation and application of RICO which require resolution by this Court.

Therefore, the Writ of Certiorari sought by the Union should be granted.

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